FILED APRIL 8, 2014

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **LEE WILLIS HARWELL, JR.,** **Member No. 115692,** A Member of the State Bar.	)	Case No.: **13-O-10193-RAH** **DECISION**

Introduction[1]

In this single client matter, the found misconduct stems from the misappropriation of $2,521.41 by gross negligence. The surrounding circumstances of this misappropriation are unique, and involve a client's failure to cash a client trust account distribution check for approximately four years. During that time, respondent lost track of the funds, thought they were attorney's fees held in the trust account, and withdrew them without taking care to assure that he was correct.

The State Bar seeks respondent's disbarment for this misconduct, respondent's first in 29 years of practice. On the other hand, respondent's counsel has asserted that there should be no public discipline and the matter should be dismissed, or at most, respondent should receive an admonition. After considering the facts and the law, the court recommends, among other things, that respondent be suspended from the practice of law for a period of six months.

[1] Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

Significant Procedural History

The Notice of Disciplinary Charges (NDC) was filed on October 8, 2013. Respondent filed his response to the NDC on November 1, 2013. The State Bar was represented by Senior Trial Counsel Christine Souhrada and Contract Attorney Sherell N. McFarlane. Respondent was represented by James I. Ham of Pansky Markle Ham LLP. Trial commenced on February 4, 2014. The matter was submitted for decision on February 5, 2014.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 3, 1984, and has been a member of the State Bar of California at all times since that date.

Case No. 13-O-10193 – The Tucker Matter

Facts

In November 2007, respondent was retained by Fred Tucker (Tucker), Vice President of the Equitable Recovery Assurance Corporation, to pursue debt collection actions against a number of defendants, including Miguel Bogran and Joselina C. Bogran (the Bograns). Respondent's retention was documented in a written fee agreement.

At all relevant times, Tucker was aware that there was an injunction imposed in another case that prevented him from pursuing collection of the Bograns' debt. (See exhibit L, pages 62-97; see also exhibit A.) Tucker, however, did not inform respondent that this injunction was in place.

After settlement was reached with the Bograns, the Bograns sent a settlement check to respondent dated July 1, 2008, in the amount of $3,448.50. Respondent deposited the $3,448.50 settlement check from the Bograns into his client trust account at Washington Mutual Bank (CTA).[2] Respondent then deducted his fees and/or costs from the settlement proceeds.

[2] Washington Mutual Bank is now JP Morgan Chase Bank, N.A.

On July 29, 2008, respondent issued check number 1296, drawn on his CTA, in the amount of $2,521.41, payable to Tucker, representing Tucker's share of the settlement proceeds. Tucker did not cash, deposit, or otherwise negotiate this check.[3]

Respondent ultimately learned about the injunction from another attorney. He confronted Tucker, and told him that he was required to dismiss the case in order to fully comply with the injunction. Respondent was required to attend hearings, and he expended over 40 hours of attorney time regarding the injunction and its effect on the judgment he collected. Thereafter, he dismissed the case with respect to the remaining defendants.

Respondent continued to represent Tucker in an unrelated case until late 2009. During the period of his representation of Tucker in this other case, Tucker did not mention check number 1296 or the fact that it had not been cashed. Respondent did not realize that check number 1296 had not been cashed.

Respondent credibly testified that he balances his CTA every month (see exhibit L, pages 17-27), but he missed check number 1296. When he discovered extra funds remaining in his account, he went through the last several months' statements, and could not find a discrepancy. Unfortunately for respondent, he did not go back far enough. He assumed the funds were excess fees left in the CTA, and he used them. This was done nearly two years after check number 1296 was issued. As a result of respondent's failure to maintain these funds, his CTA reflected a balance falling below $2,521.41 on several occasions between May 2010 and November 2011.

[3] The record is not clear as to why Tucker did not immediately negotiate check number 1296, since the State Bar did not present Tucker as a witness. It is reasonable to infer, however, that since Tucker was aware of the injunction, he intentionally delayed cashing the check. (See *Breland v. Traylor Engineering and Manufacturing Co.* (1942) 52 Cal.App.2d 415, 426 [when a party fails to introduce evidence that would naturally have been produced, the trier of fact may properly infer that the evidence is adverse to the party].)

There was no point, however, where the funds dipped below zero, so respondent was not alerted by an NSF notice from the bank that he had failed to maintain funds in his trust account.

On February 22, 2012, Tucker wrote to respondent and requested a replacement check for check number 1296. (Exhibit D.) Initially, respondent did not believe Tucker, in light of Tucker's earlier deceit in failing to inform respondent of the injunction. Thereafter, respondent verified Tucker's story and advised him that respondent was entitled to the money on a theory of unjust enrichment, given: (1) Tucker's failure to advise him of the injunction; and (2) the hours of attorney time respondent spent sorting out the impact of the injunction on his collection case.

While initially feeling this way, respondent later recognized that he would not be able to claim the money. Respondent returned the funds to his CTA in May 2013, but was unclear as to his obligations in light of the injunction. (Exhibit L, page 42.) Respondent did not know whether to pay the funds to Tucker or to the Bograns.

Respondent fully cooperated with the State Bar in responding to the State Bar investigator's questions. (See Exhibit L, pages 1-124.) At the State Bar's direction, in June 2013, respondent returned $3,448.50 to the Bograns. This represented full restitution.

Conclusions

Count One – § 6106 [Moral Turpitude]

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. "'There is no doubt that the wilful misappropriation of a client's funds involves moral turpitude. [Citations.]' [Citations omitted.]" (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033-1034.) While moral turpitude generally requires a certain level of intent, guilty knowledge, or willfulness, the law is clear that where an attorney's fiduciary obligations are involved, particularly trust account duties,

a finding of gross negligence will support such a charge. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410.)

On a single occasion,[4] respondent, with gross negligence, misappropriated for his own purposes, $2,521.41 that either Tucker or the Bograns were entitled to receive.[5] As a result, respondent committed an act involving moral turpitude in willful violation of Business and Professions Code section 6106.

Count Two – Rule 4-100(A) [Failure to Maintain Client Funds in Trust]

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in a client trust account and no funds belonging to the attorney or law firm must be deposited therein or otherwise commingled therewith, except for limited exceptions. By failing to maintain the Tucker/Bogran funds in trust, respondent willfully violated rule 4-100(A).

However, the appropriate resolution of this matter does not depend on how many rules of professional misconduct or statutes proscribe the same misconduct. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.) Since the same facts establish respondent's culpability in Count One, Count Two is duplicative. The court therefore assigns no additional weight to Count Two in determining the appropriate discipline. (See *In the Matter of*

[4] The State Bar alleges in the NDC and has repeated throughout the trial and in the closing brief that respondent repeatedly misappropriated funds. This is an incorrect statement. It is true that after the $2,521.41 was taken out of his account, the CTA dipped below $2,521.41 on several occasions. But each one of these dips was not a separate misappropriation. Further, as found below, these dips do not constitute "multiple acts" in aggravation.

[5] At the time of the improper withdrawal of funds, it was thought that the funds belonged to Tucker. After the injunction was discovered, the funds were likely required to be returned to the Bograns, since the action recovering them was in violation of the injunction order. Regardless of whether the funds were to go to Tucker or the Bograns, the funds did not belong to respondent and were required to be maintained in trust while in his possession.

Sampson (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127 [no additional weight given to rule 4-100(A) violation when same misconduct addressed by § 6106].)

Aggravation[6]

The State Bar requests that this court find three aggravating factors: multiple acts (std. 1.5(b)); bad faith (std. 1.5(d)); and indifference (std. 1.5(g).) The court disagrees.

Multiple Acts

As noted above, the misconduct involved the improper removal of $2,521.41 from respondent's CTA. This misconduct caused subsequent dips reflected in the monthly statements of his account below the $2,521.41 that should have been retained in the account. However, the dips are only evidence of the earlier misappropriation, they do not represent separate instances of misappropriation. The account never dropped below zero. Consequently, the court does not find that respondent's misconduct constituted multiple acts of wrongdoing.

Bad Faith

As noted above, this was an odd situation. Respondent received money in violation of an injunction of which he had no knowledge. Respondent paid a portion of the money to his client, who was deceitful in not telling respondent about the injunction. Respondent thought the payment to the client was made, and later found out that the client had not cashed the check. Respondent was faced with his client who had lied to him now demanding a replacement check four years later, when the client and now, respondent, were fully aware of the injunction. Respondent's indecision as to the appropriate action to take was understandable, and his delay in sorting out the matter was not bad faith, as urged by the State Bar.

[6] All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Indifference

The State Bar contends that respondent's repeated references to Tucker as a scoundrel and a fraud demonstrate indifference and lack of remorse. However, the evidence at trial was that, in fact, respondent was defrauded by Tucker, and was forced to appear before the court that issued the injunction, spend approximately 40 hours of attorney time, and dismiss the case he had successfully prosecuted against the Bograns. For respondent to have the initial reaction that he expected to be paid for his efforts is not surprising or unreasonable. Eventually, however, respondent took the advice of the State Bar and repaid the original debtor, the Bograns.

There was also some evidence that Tucker had been convicted of fraudulent conduct and served time in jail for that crime. (See Exhibit L, Judge Ashmann's Statement of Decision, page 83.) Respondent's descriptions of Tucker were consistent with the entire Statement of Decision by Judge Ashmann and were not acts of playing the "blame-game" or "finger pointing."

In addition, the State Bar did not call Tucker as a witness. Consequently, the court lacked the opportunity to assess Tucker's credibility firsthand. The State Bar's decision not to call a significant witness does not preclude respondent from commenting on that individual's character or morality.

Respondent's references to Tucker's character were supported by the limited evidence available to the court. As such, they do not constitute grounds for aggravation in this matter.

Mitigation

No Prior Record (Std. 1.6(a).)

Respondent had no prior discipline for 26 years prior to this misconduct. While the present misconduct is serious, respondent's lack of a prior record over such a long period of time is entitled to significant mitigation. (*Boehme v. State Bar* (1988) 47 Cal.3d 448, 452-453, 454-455 [twenty-two years of practice without prior discipline was important mitigating circumstance

despite attorney's intentional misappropriation and lack of candor to court]; *Friedman v. State Bar* (1990) 50 Cal.3d 235, 245 [more than 20 years of practice with an unblemished record is highly significant mitigation].)

Extreme Emotional/Physical Difficulties (Std. 1.6(d).)

Respondent has five children. In 2008, during the period of the misconduct, respondent was seriously distressed and distracted from his duties as an attorney by a tragic accident in which his oldest daughter Lillian's high school boyfriend was killed and Lillian was seriously injured. Lillian suffered brain damage, reflecting loss of memory and difficulty speaking. While in the hospital, she contracted a rare, incurable lung disease, requiring her to remain in the hospital for two weeks. Respondent was required to sue to obtain insurance coverage for this complication. Through extra attention to his daughter, he was able to prepare her to participate in a special program to attend the University of California, Santa Cruz.

Respondent's extreme emotional difficulties at the time of the misconduct contributes to the court's conclusion that the misconduct was aberrational, and is a significant factor in mitigation.

Candor/Cooperation with the State Bar (Std. 1.6(e).)

Respondent entered into a stipulation, substantially admitting culpability. This saved the court time by shortening the trial. In addition, respondent prepared a 124-page response to the State Bar's initial inquiry. Respondent is entitled to mitigation for this cooperation.

Good Character (Std. 1.6(f).)

Respondent presented several outstanding character witnesses to testify on his behalf, including multiple attorneys. Each presented positive statements as to his good character and all were aware of the charges. In particular, Duane Conover (Conover) provided persuasive testimony regarding respondent. Conover is 76 years old, and has been a lawyer for 40 years.

He has known respondent for about 10 years. He has referred many matters to respondent and has always received positive responses from those he assisted. Conover believes that respondent is an honest, ethical lawyer, and would be surprised if he knowingly took money that did not belong to him.

In addition, respondent's wife, father-in-law, and sister testified on respondent's behalf regarding his role as a dedicated father and husband. While his wife knew little about the charges and had not seen the NDC or the Stipulation, respondent's sister, an Administrative Law Judge, clearly understood the details of the charges against respondent. Nevertheless, both his wife and sister gave respondent very positive testimony as to respondent's good character, honesty, and integrity.

The above good-character evidence is worthy of some consideration in mitigation.

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. *(Chadwick v. State Bar* (1989) 49 Cal.3d. 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d. 1016, 1025.)

In determining the level of discipline, the court looks first to the standards for guidance. *(Drociak v. State Bar* (1991) 52 Cal.3d. 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628). Second, the court looks to decisional law. *(Snyder v. State Bar* (1990) 49 Cal.3d. 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.1 provides that the primary purposes of disciplinary proceedings are the protection of the public, the courts, and the legal profession; the maintenance of high professional standards; and the preservation of public confidence in the legal profession. This

standard also provides that rehabilitation can "be an objective in determining the appropriate sanction in a particular case, so long as it is consistent with the primary purposes of discipline."

Standard 1.7 provides that if aggravating or mitigating circumstances are found, they should be considered alone and in balance with any other aggravating or mitigating factors.

Standard 2.1(b) provides that disbarment or actual suspension is appropriate for misappropriation involving gross negligence. Standard 2.2(b) provides that suspension or reproval is appropriate for any violation of rule 4-100 that does not involve commingling or failing to promptly pay out entrusted funds.

The standards, however, "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Ct. Rptr. 980, 994.) It has long been held that the court is "not bound to follow the standards in a talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar urges that respondent be disbarred. Respondent, on the other hand, asserts that the present misconduct warrants no more than an admonition. In determining the appropriate level of discipline, the court also looks to the case law for guidance.

The term "'willful misappropriation' covers a broad range of conduct varying significantly in the degree of culpability. An attorney who deliberately takes a client's funds, intending to keep them permanently, and answers the client's inquiries with lies and evasions, is deserving of more severe discipline than an attorney who has acted negligently, without intent to deprive and without acts of deception." (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 38.) Disbarment would rarely, if ever, be the appropriate discipline in cases involving a single act of

negligent misappropriation, absent deception or other aggravating factors. (*Ibid*.) And less discipline has been imposed in cases where the attorney lacked evil intent, and his or her circumstances indicated the "misconduct was aberrational and hence unlikely to recur." (*Ibid*.)

The Supreme Court has repeatedly declined to order disbarment in single-client misappropriation cases involving a relatively small amount of money and compelling mitigation. (See *Edwards v. State Bar*, *supra*, 52 Cal.3d 28 [one-year actual suspension on a $3,000 misappropriation]; *Hipolito v. State Bar* (1989) 48 Cal.3d 621 [one-year actual suspension on a $2,000 misappropriation]; *Howard v. State Bar* (1990) 51 Cal.3d 215 [six-month actual suspension on a $1,300 misappropriation]; *Bates v. State Bar* (1990) 51 Cal.3d 1056 [six-month actual suspension on a $1,229.75 misappropriation].)

In support of its disbarment recommendation, the State Bar cited, among other cases, *Chang v. State Bar* (1989) 49 Cal.3d 114. In that case, the attorney was found culpable, in a single-client matter, of misappropriating $7,900 in client funds, failing to provide his client with an accounting, and making misrepresentations both to his client and to the State Bar. In aggravation, the attorney's misconduct caused significant harm and he never acknowledged the impropriety of his actions. No mitigating circumstances were found. The Supreme Court ordered that the attorney be disbarred. The Supreme Court's order of disbarment was predicated on the Court's doubt as to whether the attorney had the ability to conform his future conduct to the professional standards demanded of California attorneys. (*Id*. at p. 129.) The Supreme Court specifically addressed three areas of doubt: (1) the attorney's failure to acknowledge the impropriety of his conduct; (2) the attorney's failure to make any efforts toward restitution; and (3) the attorney's lack of candor before the State Bar. (*Ibid*.) Further, the Supreme Court determined that the attorney's misappropriation was deliberate and not the result of negligence or inexperience.

Unlike *Chang*, the misappropriation in the present case was a product of respondent's gross negligence. Consequently, the court also looked to *Lipson v. State Bar* (1991) 53 Cal.3d 1010, *Snyder v. State Bar*, *supra*, 49 Cal.3d 1302, and *Porter v. State Bar* (1990) 52 Cal.3d 518, for further guidance.

In *Lipson*, the attorney committed "serious and inexcusable lapses in office procedure" resulting in his misappropriation of $8,400 through gross negligence. (*Lipson v. State Bar*, *supra*, 53 Cal.3d 1010, 1020.) The attorney also issued NSF checks and improperly borrowed and failed to repay money from clients. In mitigation, the misconduct was aberrational, the attorney was candid, he did not seek bankruptcy protection, he demonstrated contrition for his failure to repay the loans, and he had no prior record of discipline over several years prior to the misconduct. No factors in aggravation were found. The California Supreme Court ordered, among other things, that the attorney be suspended for two years and pay restitution to his clients.

In *Snyder*, the attorney failed to maintain records of client funds and misappropriated over $3,000. In mitigation, the attorney suffered an emotional breakdown and voluntarily terminated the remainder of his practice at the time of the misconduct.[7] In aggravation, the attorney's misconduct extended over a substantial period of time and involved several separate acts. The California Supreme Court ordered, among other things, that the attorney be suspended for two years.

In *Porter*, the Supreme Court imposed a two-year actual suspension for an attorney who committed serious misconduct in nine client matters, including misappropriation of settlement funds, writing a bad check, forgery, lying to clients, and practicing law while suspended. In one

[7] Although the attorney had no prior record of discipline, this was not considered in mitigation due to the short duration of his legal career.

matter, he settled a case for $5,000 without the client's consent or knowledge, forged the client's name to a release and her endorsement on the check, and kept the money. The attorney had strong mitigating factors, such as extreme emotional difficulties and rehabilitation evidenced by community and professional activities.

The court finds that the present matter does not rise to the same level of *Lipson*, *Snyder*, or *Porter*. As noted above, the present case is limited to a single act of grossly negligent misappropriation. The money was refunded and there is no indication that respondent's actions were motivated by evil intentions. Further, the evidence indicates that respondent's misconduct was aberrational, and unlikely to be repeated.

Based on the relatively small amount of misappropriation and respondent's lack of evil intent, the court recommends a level of discipline more on par with the aforementioned *Edwards*, *Hipolito*, *Howard*, and *Bates* decisions. The unique circumstances and respondent's compelling mitigation lead the court to the conclusion that, among other things, a six-month period of actual suspension is appropriate.

Therefore, the court recommends, among other things, that respondent be suspended from the practice of law for two years, that execution of that period of suspension be stayed, and that he be placed on probation for two years, including a minimum period of actual suspension of six months.

Recommendations

It is recommended that respondent Lee Willis Harwell, Jr., State Bar Number 115692, be suspended from the practice of law in California for two years, that execution of that period of

suspension be stayed, and that respondent be placed on probation[8] for a period of two years subject to the following conditions:

1. Respondent is suspended from the practice of law for the first six months of probation.

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.

4. During the probation period, respondent must report in writing quarterly to the Office of Probation. The reports must be postmarked no later than each January 10, April 10, July 10, and October 10 of the probation period. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of respondent's probation conditions during the preceding calendar quarter or applicable reporting period. If the first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of probation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.

5. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.

6. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and of the State Bar's Client Trust Accounting School and passage of the tests given at the end of those sessions. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School or Client Trust Accounting School. (Rules Proc. of State Bar, rule 3201.)

7. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation

[8] The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request.

At the expiration of the probation period, if respondent has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

Multistate Professional Responsibility Examination

It is recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the Supreme Court order imposing discipline in this matter and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

California Rules of Court, Rule 9.20

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: April _____, 2014

RICHARD A. HONN
Judge of the State Bar Court